

COPY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:

The City of Fort Morgan
Fort Morgan, Colorado

NPDES Permit No. CO 0044849

) **ORDER FOR COMPLIANCE** 7:24
)
) Proceeding under Section 309(a)
) of the Clean Water Act
)
) Docket No. CWA-08-2006-0052
)
)
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STATUTORY AUTHORITY

This Order for Compliance (Order) is issued pursuant to section 309(a)(3) of the Clean Water Act (Act), 33 U.S.C. § 1319(a)(3), which authorizes the Administrator of the United States Environmental Protection Agency (EPA) to issue an order requiring compliance by a person found to be in violation of sections 301, 302, 306, 307, 308, 318, or 402 of the Act, or in violation of any permit condition or limitation implementing any such sections of the Act. This authority has been delegated to the undersigned official.

This Order is also issued pursuant to section 308(a) of the Act, 33 U.S.C. § 1318(a), which authorizes the Administrator of the EPA to require reports necessary to determine compliance. This authority has been delegated to the undersigned official.

Section 307(b) of the Act, 33 U.S.C. § 1317(b), directs the Administrator of the EPA to establish Pretreatment Standards applicable to indirect discharges to control those pollutants that are determined not to be susceptible to treatment by a Publicly Owned Treatment Works (POTW) or which would interfere with the operation of such POTW; these standards are promulgated at 40 C.F.R. part 403.

FINDINGS OF LAW and FACT

1. The City of Fort Morgan is a "municipality" as defined by section 502(4) of the Act, 33 U.S.C. § 1362(4).

2. A municipality is a "person" within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5), for purposes of federal enforcement.
3. The City of Fort Morgan owns and operates a Publicly Owned Treatment Works (POTW), located at 18169 Road 22, Fort Morgan, Colorado. The POTW discharges treated wastewater into the South Platte River. The POTW has a design capacity of 2.25 million gallons per day (MGD) and an average daily flow of 0.922 MGD. National Pollutant Discharge Elimination System (NPDES) permit number CO 0044849, issued by the State of Colorado on June 20, 2002, and effective on August 1, 2002, authorizes the City of Fort Morgan to discharge in accordance with section 402 of the Act, 33 U.S.C. § 1342.
4. The State of Colorado is an "NPDES State", because EPA has approved the State of Colorado's NPDES program pursuant to section 402(b) of the Act, 42 U.S.C. § 1342(b). However, the State of Colorado has not received EPA approval for its pretreatment program. Therefore, at all times relevant to this Order, EPA has been and continues to be the "Approval Authority" within the meaning of 40 C.F.R. § 403.3(c).
5. The General Pretreatment Regulations set forth at 40 C.F.R. § 403.8(a) provide that "[A]ny POTW (or combination of POTWs operated by the same authority) with a total design flow greater than five (5) MGD and receiving from industrial users pollutants which pass through or interfere with the operation of the POTW or are otherwise subject to Pretreatment Standards will be required to establish a POTW Pretreatment Program" unless the NPDES State otherwise assumes the responsibility.
6. EPA approved the City of Fort Morgan's POTW Pretreatment Program on August 10, 1985, at which time the City of Fort Morgan became the "Control Authority" within the meaning of 40 C.F.R. § 403.12(a).
7. As the "Control Authority," the City of Fort Morgan is responsible for ensuring that Industrial Users (defined in 40 C.F.R. § 403.3) discharging to the POTW comply with all Pretreatment Standards and Requirements (also defined in 40 C.F.R. § 403.3).

8. Pursuant to 40 C.F.R. § 403.8(f)(5) of the Pretreatment Program Requirements, "The POTW shall develop and implement an enforcement response plan containing detailed procedures indicating how a POTW will investigate and respond to instances of industrial user noncompliance."
9. EPA approved the City of Fort Morgan's document "City of Fort Morgan Industrial Pretreatment Enforcement Response Guide" (ERP), dated May 12, 1995.
10. Pursuant to 40 C.F.R. § 403.8(f)(2)(vii), an Industrial User is in significant noncompliance (SNC) if its violation meets one or more of the listed criteria including, but not limited to, chronic violations of wastewater discharge limits.
11. Wastewater is a "pollutant" within the meaning of section 502(6) of the Act, 33 U.S.C. § 1362 (6).
12. Dairy Farmers of America (DFA) is a milk condensing facility (standard industrial classification 2023) that discharges wastewater to the City of Fort Morgan's POTW.
13. DFA is an "Industrial User" within the meaning of 40 C.F.R. § 403.3(h), and a "Significant Industrial User" as defined at 40 C.F.R. § 403.3(t). The City of Fort Morgan determined that DFA is a Significant Industrial User (SIU) to the POTW and established local limits for the facility.
14. The City of Fort Morgan prepared and submitted to EPA the Pretreatment Program Annual Reports for 2004 and 2005.
15. EPA conducted a Pretreatment Compliance Inspection (Inspection) of the City of Fort Morgan's pretreatment program on May 25, 2006. The Inspection included a file review and personnel interviews.
16. EPA conducted an Industrial User Inspection of DFA on May 25, 2006. The Inspection included a physical inspection of the facility, file review and personnel interviews.

VIOLATIONS

Count I (Failure to Enforce Standards)

17. Pursuant to the ERP (enforceable via 40 C.F.R. § 403.8(f)(5)) and the City of Fort Morgan NPDES permit, CO 0044849 (Part I.A.7.a.v), the City of Fort Morgan POTW is required to enforce all

applicable pretreatment standards and requirements and obtain remedies for noncompliance by any Industrial User.

18. Based on the 2005 Pretreatment Program Annual report for the City of Fort Morgan's POTW, the City of Fort Morgan determined that DFA was in SNC for chronic violations of the permitted flow limit. In addition, DFA repeatedly violated its permit limits for pH and Biochemical Oxygen Demand (BOD) in 2004 and 2005.
19. The City of Fort Morgan POTW's ERP provides the appropriate enforcement action, as well as escalation of enforcement.
20. The City of Fort Morgan has not initiated appropriate enforcement action for DFA's failure to achieve compliance of its permit limits for flow, pH, and BOD, in nonconformance with the ERP.
21. The City of Fort Morgan POTW's failure to initiate appropriate enforcement for DFA's effluent limit violations constitutes violations of 40 C.F.R. § 403.8(f)(5) and the City of Fort Morgan NPDES permit, CO 0044849 (Part I.A.7.a.v.).

Count II
(Failure to Enforce IU Sampling Requirements)

22. Pursuant to ERP (enforceable via 40 C.F.R. § 403.8(f)(5)) and Part I.A.7 of the City of Fort Morgan permit, the City is required to control and enforce the contribution by each industrial user to ensure compliance with the applicable pretreatment standards. This is accomplished by requiring effluent sampling by the SIUs.
23. The City of Fort Morgan issued a permit to DFA which requires that BOD and Total Suspended Solids (TSS) be sampled daily. From at least 2004 through May of 2006, multiple daily sampling events for BOD and TSS were not conducted at DFA, including but not limited to the following dates: 1/5/05, 1/22/05, 1/28/05, 2/23/05, 3/23/05, 8/25/05, 9/8/05, 9/14/05, 10/10/05, 10/11/05, 10/15/05, 11/2/05, 11/9/05, 11/10/05, and 11/19/05.
24. DFA's permit also requires semi-annual sampling for metals and cyanide. DFA sampled for metals and cyanide only once in the two year period 2004 to 2005.

25. The City of Fort Morgan failed to take any enforcement action for the IU's failure to conduct all daily BOD and TSS sampling requirements, and semi-annual metals and cyanide sampling, in violation of 40 CFR § 403.8(f)(5) and Part I.A.7. of the City's permit.

Count III
(Failure to Meet Recordkeeping Requirements)

26. Pursuant to 40 C.F.R. § 403.12(g)(1), the City of Fort Morgan may perform sampling and analysis in lieu of DFA. 40 C.F.R. § 403.12(g)(4) requires all analyses to be performed in accordance with 40 C.F.R. Part 136 or any other test procedures approved by EPA.
27. 40 C.F.R. Part 136 test procedures include, among other things, requirements to document the date, time, type of sample, and analytical methods. 40 CFR Part 136 also includes sample preservation requirements (i.e., keeping samples at a specific temperature).
28. From at least 2004 through May 2006, sampling the City of Fort Morgan conducted for DFA failed to comport with 40 CFR Part 136 (or any other test procedures approved by EPA) sample times, type of sample collected, initials of the sampler, and sample preservation.

Count IV
(Failure to Sample)

29. Pursuant to 40 C.F.R. § 403.8(f)(2)(v), Fort Morgan NPDES permit, CO 0044849 Part I.A.7.a.ii, and Section II.B of the ERP (enforceable via 40 CFR § 403.8(f)(5)), the City of Fort Morgan is required to sample annually all parameters specified in the IU's permit to verify the IU's compliance status.
30. From at least 2004 through May 2006, the City of Fort Morgan did not sample DFA's wastewater annually for all parameters, specifically for metals, cyanide, and total toxic organics.
31. The City of Fort Morgan POTW's failure to conduct sampling for all parameters (specifically metals, cyanide, and total toxic organics) is in violation of 40 C.F.R. § 403.8(f)(2)(v), Fort Morgan NPDES permit, CO 0044849 Part I.A.7.a.ii, and 40 CFR § 403.8(f)(5).

ORDER

The City of Fort Morgan is ordered to perform the following actions:

32. Upon receipt of this Order, the City of Fort Morgan POTW shall immediately take all action necessary to properly implement and enforce its approved Pretreatment Program in accordance with the Act, the pretreatment regulations, the Fort Morgan NPDES permit, CO 0044849, and the approved ERP.
33. Within ten (10) days of receipt of this Order, the City of Fort Morgan POTW shall give written notice to EPA of its intent to comply with the requirements of this Order.
34. Within thirty (30) days, the City of Fort Morgan POTW shall submit a report to EPA describing the actions proposed and/or taken to address the violations cited in this Order. This report shall include specific dates for the actions to be taken, references to the violations prompting the actions, and a discussion on how each of the proposed actions comply with the Act, the pretreatment regulations, the Fort Morgan NPDES permit, CO 0044849, the ERP, and the IU's permit.
35. Within fourteen (14) days after the end of each calendar quarter the City of Fort Morgan POTW shall submit to EPA a summary of all DFA's violations identified during the previous quarter, and the City of Fort Morgan POTW's enforcement response planned or taken. This reporting requirement shall continue until EPA provides written notice that it may cease.
36. Upon written notice by EPA, the City of Fort Morgan POTW will submit an itemized list of all costs incurred to implement the actions specified in paragraphs 32-35.
37. All written notices and reports required by this Order shall be sent to the following addressee:

Lee Hanley (8ENF-W-NP)
U.S. EPA Region 8
999 18th Street, Suite 300
Denver, Colorado 80202-2466

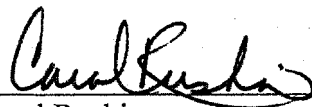
38. Any failure to comply with the requirements of this Order shall constitute a violation of said Order and may subject the City of Fort Morgan POTW to penalties as provided under section 309 of the Act, 33 U.S.C. § 1319.

39. This Order does not constitute a waiver or modification of the terms and conditions of the City of Fort Morgan's NPDES permit which remains in full force and effect.
40. This Order does not constitute a waiver or election by EPA to forego any civil or criminal action to seek penalties, fines or other relief as it may deem appropriate under the Act. Be advised that section 309(d) of the Act, 33 U.S.C. § 1319(d), authorizes the imposition of civil penalties of up to \$32,500 per day for each violation of the Act, while section 309(c) of the Act, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the Act.
41. Nothing in this Order shall be construed to preclude the institution of further action under section 309 of the Act, 33 U.S.C. § 1319, for those violations cited herein or relieve the City of Fort Morgan POTW from responsibilities, liabilities, or penalties established pursuant to any applicable Federal and/or State law or regulation.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8

Date:

9/26/2006



Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the ORDER FOR COMPLIANCE was hand-carried to the Regional Hearing Clerk, EPA Region 8, 999 18th Street, Suite 300, Denver, Colorado, and that true copies of the same were sent as follows:

Via certified mail (7005 0390 0000 4847 0241) to:

Victoria Simonsen, City Superintendent
City of Fort Morgan
P.O. Box 100
Fort Morgan, CO 80701

September 29, 2006
Date

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